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**Issue Date: 20 October 2005**

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In the Matter of

EUGENE HAWKINS
Claimant
v.
SSA – COOPER LLC;/HOMEPORT INSURANCE CO.
Employer/Carrier
And
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party in Interest
……..

Case No. 2004 LHC 01295
OWCP No. 6-190183

## Decision and Order

### Introduction

This matter involves a claim for compensation filed under the Longshore Act by Eugene Hawkins of Jacksonville, Florida. On December 12, 2002, Hawkins injured his right knee while working as a lasher for SSA-Copper when he stepped on lashing gear on the deck of a ship and twisted his knee, rupturing the quadriceps tendon. He was treated at the emergency room at Baptist Hospital, and later by Dr. Tandron, who surgically repaired the tendon on January 2, 2003. The parties have agreed that Claimant reached maximum medical improvement (MMI) on August 24, 2003, with a six percent rating of his knee. Tr. 64, 71, 74. The parties further stipulated that Hawkins' average weekly wage is $1,665.97. Tr. 69.

Claimant received temporary total disability benefits from December 13, 2002 through August 29, 2003, totaling $36,303.95, (CX 6; Cx 8), and $17,220.21 for 17.28 weeks in permanent partial disability compensation paid as a scheduled award for the stipulated six percent permanent partial impairment of the right knee. Accordingly, Employer argues that it has fully compensated Claimant for his temporary total disability and for his scheduled injury after he reached MMI. Claimant contends that he remains totally disabled because he is unable to return to

his job as a lasher, and Employer failed to establish the availability of suitable alternate work.

## Findings of Fact
## I.

On July 24, 2003, Hawkins was released for modified duty by Dr. Tandron provided he wore a leg brace and did not squat. He returned to the docks seeking a job as a lasher, shaped up and joined a gang, but was able to work only briefly due to pain in his knee. Tr. 64. On July 28, 2003, the President ILA Local 1408, Vincent Cameron, then serving as vice president, provided Hawkins with a letter advising that it is the Local's position that no light duty jobs are available on the docks. Cx19. The next day, Dr. Tandron placed Hawkins on "no work" status. Cx 18.

Hawkins returned to Dr. Tandron on August 25, 2003. Dr. Tandron placed him at maximum medical improvement (MMI) on that date (the stipulated date of MMI, however, is August 24, 2003), and released him for modified duty with no repetitive squatting, climbing or kneeling; and no lifting of more than thirty to forty-five pounds. (Cx 18). Dr. Tandron indicated further that he had received job descriptions for longshore positions which he considered appropriate for Hawkins; van driver and auto driver. Cx 18. He noted that Hawkins advised him that there was a "big step-off" from the van, but Dr. Tandron nevertheless considered that job reasonable. Cx 18. Dr. Tandron did not report that Hawkin's expressed any concern about the adjustability of the driver's seat in the van; a concern Hawkins would later emphasize at hearing. Thus, at MMI, Dr. Tandron considered two longshore jobs suitable for Hawkins; but he did not release him to return to his pre-injury job as a lasher, and the Employer, in this proceeding, does not contend that Hawkins can return to his former job as lasher on the docks.

Following his visit to Dr. Tandron, Hawkins returned to the docks, again shaped up and joined a gang and worked briefly as an auto driver on August 26, 2003. On this occasion, the work exacerbated his knee condition, Tr. 65; 170, and after about an hour, his leg swelled, rendering him incapable of remaining on the job. As a result, the ship foremen knocked him off. Tr. 170, 210. Hawkins then left work and was treated at Baptist hospital. On the same date, the financial secretary of ILA, Local 1408 provided Hawkins with another letter, this time advising that there are "no modified duty" jobs available on the docks. CX 22.

On September 8, 2003, Dr. Tandron released Claimant for modified duty with permanent restrictions including "no climbing, bending, or pulling. No lifting greater than 35-45 pounds, and no repetitive squatting, climbing or kneeling." Cx 18. Thereafter, on September 15, 2003, Dr. Tandron provided an Attending Physician's Statement to the ILA Pension and Welfare Administration in support of Hawkins' application for disability retirement benefits indicating that Hawkins was totally disabled for longshore work but that he is not totally disabled for "any occupation" and is capable of "light work." Cx 23. At his deposition on January 24, 2004, Dr. Tandron clarified that the squatting restriction he imposed was once or twice an hour "or something like that."

II.

The record shows that Hawkins worked as a longshoreman for nearly thirty years and has a relatively high seniority rating, holding a "G" card, which, with medical permission, can be reinstated if Hawkins voluntarily foregoes his disability retirement benefits and returns to longshore work. At present, Local 1408 has only four members who hold "G" Cards. Tr. 212.

Claimant feels he can work, and since reaching MMI, believes he could have worked with the restrictions imposed by Dr. Tandron. Tr. 121. He believes can perform office work, public relations, and light duty. Tr. 122. He claims he is always looking for a job "making a good salary, making good money and it ain't got to work a whole lot of hours I'm always open for that type of job if it's available." Tr. 124. He is looking for "high wages and less time…." Tr. 124. *See also*, Tr. 126. As a longshoreman, Claimant made about $87,000 per year. Tr. 171.

Claimant testified that he has never been turned away from a job by the ILA, Tr. 211, and even if the Local did turn him away, he could still shape up, Tr. 211, but he believes he would be "outside the by-laws," and someone could file grievance if he took their job, Tr. 212-13, resulting in his suspension for insubordination. Tr. 214. This, however, has not actually happened.

Claimant's vocational opportunities were evaluated by Rick Robinson, a vocational rehabilitation expert. Robinson determined that Claimant has sixth grade math skills. Tr. 436. Hawkins has a GED and several years of post-secondary education in radio broadcasting and electrical engineering. Tr. 85; Tr 431; Rx 184 at 169. He has thirty years of experience on the docks, working various jobs as a longshoreman including lasher, crane operator, auto driver, yard

hustler driver, and harness man. Tr. 88-90. He has more recently completed college level courses in English and key-boarding. Tr. 443. Robinson did not administer a vocational test to Hawkins, Tr. 437-40, 442, but he assessed his transferable skills based on his past jobs and education. Tr. 444-45. Robinson did not do prepare a transferable skills report, but he did do a transferable skills analysis. Tr. 512. In his opinion, Hawkins has the capability of learning to use a computer if an employer provided training. Tr. 432.

In addition, Claimant holds a valid driver's license with no restrictions, but he has amassed 11 points. Tr. 84. His history also includes three criminal felony convictions more than ten years ago, Tr. 114, is a former cocaine addict, Tr. 195, and he has a slight speech impediment. Tr. 87.

## III.
## Suitable Alternate Employment
### A.
### (Longshore)

The parties expended considerable time and resources in this proceeding devoted to the question of whether any longshore jobs were suitable and available to Hawkins. Employer's vocational expert conducted a vocational interview, Ex 184 at 147-153, considered Hawkins physical restrictions, reviewed his industrial history, and testified he selected various longshore jobs he believed were consistent with the initial restrictions Dr. Tandron imposed. Tr. 330. On August 19, 2003, he submitted two longshore job descriptions, van driver and auto driver, to Dr. Tandron. Tr. 330-331; EX 184, at 157-159; Tr. 160-62; Ex. 184 at 6. Dr. Tandron approved both jobs with modifications that included wearing a brace and only occasional climbing and modified squatting. Id; Tr. 333-34.

Although Dr. Tandron released Hawkins for modified duty and initially considered both auto driver and van driver as reasonable for Hawkins, Local 1408 advised that there are no light duty or modified duty jobs available on the docks. CX 19; Cx 22.

Vincent S. Cameron, President, ILA, Local 1408 testified in this proceeding. Tr. 225. His Local has 1167 members but only about five hundred are enumerated on the seniority list because retirees are not on the roster. Tr. 250-1. Explaining the hiring process, Cameron testified that the day prior to a job, the stevedore places an order for the number of longshoreman it will need to facilitate the loading or

unloading of a ship. Tr. 226. The Local, consistent with a shape-up process based on a seniority system then provides labor under the terms of the collective bargaining agreement regarding gang size for car ships, container ships, bulk cargo, etc. Tr. 225-26.

President Cameron testified that containers are Jacksonville's main cargo, but it is the second largest auto ship port on the eastern seaboard, Tr. 227, and an auto ship, by contract, requires a minimum gang size of fifteen people, including a gear man who also serves as van driver. Tr. 228. He explained that a ship with 2000 cars would probably use three gangs, about five vans and seventy-five auto drivers. Tr. 232-33. If the order exceeds twenty-five workers, a dock foreman is required and the foreman brings van drivers. Tr. 228.

Van drivers primarily ferry personnel, but they may be required to put out water buckets, deliver equipment, and hook-up vehicles that must be towed. Tr. 230-31. Hawkins also noted that the driver's seat in the vans do not adjust, and this would present a special problem for him because he wears a brace. Tr. 162-63; 167. In addition, auto and van drivers may be required by the header to perform any job under their classification such as, for example, lasher. President Cameron noted that lashers are needed on auto ship gangs for both the loading and unloading process, Tr. 229, under the collective bargaining agreement, the stevedore may, after shape up, assign a gang member to other longshore jobs.

The record shows that if the Local is aware of an injured worker's physical infirmity, it may "police" the contract requirement that only able-bodied workers be dispatched to the jobsite. Tr. 237-38. The Seniority Committee polices the policy. When an injured individual returns to work, he provides the committee with all relevant data that allows him to return, including the physician's letter which is forwarded to the business agent who inquires further if restrictions are placed on the worker. Tr. 267.

Prior to shape up, the physical capability of an injured longshoreman to perform the work is determined by his physician, Tr. 243. CX 18, but as the Local's letter dated July 28, 2003, states, Local 1408 believes there is no "light-duty longshore work" available on the docks and all longshoreman must be "100% physically fit;" a phrase President Cameron later clarified. Tr. 244. By 100% physically fit, he meant sufficiently able-bodied to perform the work of longshoremen. Tr. 264-65; 269-71; 284-85. He testified further that unless a worker is sufficiently able-bodied to perform all of duties of a longshoreman, the

ILA has the authority under the collective bargaining agreement to prevent him from shaping-up for a gang. Tr. 237-38, 264-67; *See also,* Tr. 336-340.

President Cameron testified that the Local would prevent the shape up of a member with "a big ole contraption" or brace on his arm or leg notwithstanding a release from a doctor, Tr. 245, *see*, Tr. 294-95, and Hawkins wore a leg brace. Tr. 257. If the Local is unaware of a problem, it, obviously, will not stop a longshoreman from working. Tr. 259. If, however, it does know about the problem, it has the power under the collective bargaining agreement to stop him. Tr. Tr. 247-48, 258-59.

Once a union member shapes up and is on the job, however, the Local has no authority under the collective bargaining agreement to tell a longshoreman he can not work, assign him duties, or interfere with a header's decision to re-assign a worker consistent with the terms of the collective bargaining agreement. Tr. 236-37; EX 179. At that point, he has been hired by the header and is working for the stevedore. Tr. 238.

Robinson has observed and video taped the jobs of van driver and auto driver, has observed auto loading and unloading operations, and has interviewed workers performing those jobs. Tr. 394-99. He also concluded that there was a reasonable probability that a "G" card could obtain a van driver job, Tr. 402, and noted that he has never personally observed anyone in these positions being "swapped out." Tr. 399-400.

President Cameron acknowledged that Hawkins' "G" card confers fairly high seniority, Tr. 248, and since container ships pay a higher scale, they tend to lure away the higher seniority workers. Tr. 249. Thus, van driver and auto driver jobs are more readily available to longshoreman with high seniority. He agreed that neither job demands much physical labor, Tr. 252-54, but he did note that the auto driver job requires prolonged bending because the decks have low clearances and considerable walking and climbing because some ships have fifteen decks and the vans do not reach them all, thus requiring the auto drivers to climb spiral staircases, ladders, and ramps. Tr. 254-55.

From the standpoint of the Local, Hawkins may be able to drive the van; but as a longshoreman he can be shifted to another job that exceeds his restrictions, Tr. 281-82, and this is what prevents him from qualifying as "able-bodied," Tr. 286-87, because the duties of a van driver or auto driver include not just driving, but all

other jobs a van driver or auto driver can be called on to perform, including lasher. Tr. 287-88.

When a longshoreman is moved from one job to another, it is usually ordered by the header. Tr. 295. If the stevedore directed a header not move a light duty worker to a heavier job, the header would comply but probably not take the worker the next day. Tr. 296-97. Header has the "right to ask anybody to do any job." Seniority will get a worker dispatched, but if a lasher is needed, Hawkins could, even with a "G" card, be required to lash if ordered by the header or, as a matter of practice, if other members of his gang had higher seniority. Tr. 298-99.

Cameron testified that if a stevedore wanted to ensure that injured workers were assigned only jobs consistent with their restrictions, "they could present that to a header…," but he anticipates that such a request could cause problems among the rank and file especially among those "who had seniority and were asked to do the job the injured worker should have done." Tr. 300-02. Nevertheless, in this instance, the stevedore never asked that Hawkins be given a job and protected from reassignment, Tr. 304, and Local 1408's position is that no one, including injured workers, should get special or preferential treatment. Tr. 303.[1]

Collective Bargaining Agreement

Local 1408 interprets the collective bargaining agreement as conferring upon it the authority to prevent a member who it deems not able-bodied from shaping up. Tr. 245.

To be able-bodied, the Local insists a worker must be capable of performing all longshore jobs not just the job for which he shaped-up, because the employer is authorized under the collective bargaining agreement to shift a worker away from the originally assigned task .

[1] At hearing, Employer offered documents that purport to show that the Local's contentions are "disingenuous." This evidence, however, was excluded and the Employer made several offers of proof in support of its contention that impaired longshoremen routinely work on the docks. Employer thus proffered thirteen other longshoremen who were working with permanent physical impairments of varying degrees, but each, unlike Hawkins, apparently performed all of the jobs assigned by the header. Indeed, at page 28 of its brief, Employer conceded that these thirteen individuals are all…"performing light duty, moderate duty, and heavy menial labor Longshore work." This clearly distinguishes them from this Claimant who patently can not perform moderate or heavy labor. Thus, whether or not the Local allows these workers to shape up, is not analogous to Claimant because, unlike Claimant, these workers as sufficiently able-bodied to perform all the work of a longshoreman without the need for preferential treatment or seniority disputes should a header switch them from the job they bid at the hiring hall to a different job at the worksite. *See, eg.* Tr. 276-77; 283-84; Tr. 303-04.

Paragraph 13 (D)(2) of the collective bargaining agreement provides:

> There shall be no interference with the Employer's right to shift personnel from hatch to hatch, ship to ship, dock to ship or ship to dock so long as the number of employees shifted from any gang does not reduce the Gang structure below the minimum required as determined by the class of cargo being handled by the Gang….
>
> The Employer reserves the right to hire and discharge. It is recognized that the Employer has the right to utilize personnel in any combination of job classifications for which they are qualified, providing that they receive the pay rate of the highest job classification in which they are employed during a shift. Ex 179 at 16; *see,* Tr. 242-43.

The collective bargaining agreement, under its General Cargo provisions, Paragraph 6 provides that:

> No worker will be allowed to shape up or remain on the job if under the influence of drugs or alcohol or is not physically qualified to safely perform all work to which he is assigned. Ex 179 at 40; Tr. 260-61.

Although the employer questioned whether this language from the general cargo provisions applies to auto carriers, Tr. 262-63, the Local maintains that the auto vessel carrier rules are subsumed within the general cargo rules. Tr. 263-64. Consequently, it contends that a longshoreman who is incapable of performing all of the jobs the Employer may assign him during the course of a shift pursuant to Paragraph 13 (D)(2) is not physically qualified and the local may prevent him from shaping-up under Paragraph 6 of the contract.

The record shows that the job of lasher is, under the contract, the only job guaranteed for 8 hours which can not be switched out. Tr. 150. Auto drivers and van drivers can be switched to lasher and other jobs. Tr. 151, 155,159, 167-68, 203-04. Robinson has seen members of a car gangs moved to other jobs such as flagman, but has not actually observed the reassignment of a van driver. Tr. 416. He acknowledged that van driver may have to bend at the knee to hook up a tow

rope, Tr. 418, and agreed that if a van driver and auto driver can be required to move to auto lashman or flagman, for example, then the physical requirements of those jobs must be included in the requirements of the auto driver or van driver jobs. Tr. 422-23.

B.
Suitable Alternate Employment
(Non-Longshore)

In addition to the longshore jobs he identified, Robinson also conducted three labor market surveys of non-longshore job opportunities in the Jacksonville area. Ex 184 at 136; Tr. 329; 346. The first labor market survey was dated September 19, 2003. Tr. 346; Ex 184 at 136. In it, Robinson identified nine jobs he considered vocationally appropriate for Hawkins, Ex 184 at 136-46, and Dr. Tandron approved four of them; route service representative at $8.63 per hour; EX 184 at 125, checker at $16.50 per hour, part-time; EX 184 at 128, truck driver at $18.50 per hour part-time, EX 184 at 129; and alarm monitor at $8.00 per hour, EX 184 at 133. Dr. Tandron imposed modifications on two of the jobs, route representative and checker, and as a consequence of the modifications, Robinson no longer deemed the checker job, Tr. 349, or the route service job appropriate, Tr. 353. Further, in view of the thirty inch step used to get into the hustler, Robinson also deemed the truck driver/hustler job unsuitable. Tr. 446-47.

The last job on the first survey, the alarm monitor job, involved the use of a computer at a dispatch center. Tr. 448. It entailed 100% sitting, with bending, stooping and squatting "as needed," Tr. 449-450; Tr. 508, but Robinson could not "guarantee" that squatting or stooping would not be needed more than once or twice an hour. Tr. 451-53. Further, he had not inquired whether the alarm company performed a background check on prospective employees, and Hawkins has three felony convictions, all over ten years old. Tr. 518-19. Robinson considered it reasonable that an alarm company might decline to hire someone with a criminal background, Tr. 453-54, and the record shows that Hawkins applied for this job, and was told nothing was available. Ex 185 at 53; Tr. 456-57.

Robinson conducted a second labor market survey, including jobs from January 1, 2004 through April 30, 2004. Tr. 354; Ex 184 at 93-111. In this survey, Robinson identified nineteen jobs he considered vocationally appropriate for Hawkins, and Dr. Tandron approved sixteen of them. *See*, Ex 184 at 71; 72; 73; two unnumbered exhibit pages, 4 of 19 and 5 of 19; 74; 75; 77; 78; 79; 80; 81; 82; 83; 85; 86; and 87. Six of the jobs approved by Dr. Tandron were subsequently

deemed inappropriate by Robinson because Dr. Tandron included modifications which were inconsistent with their physical requirements. These included Florida Citrus Center cashier, Ex. 184 unnumbered at 5 of 19, Tr. 358; Order/packer, Ex 184 at 72; Flash Foods cashier, Ex 184 at 74; Citgo cashier/stocker, Ex 184 at 75; restaurant dishwasher, Ex 184 at 80; driver/dental lab technician, 82. *See,* Tr. 355-Ex 184 at 44-45. Additionally, Robinson eliminated the job as a dental lab driver because Hawkins had eleven points on his driving record. Tr. 367-68. The remaining approved jobs ranged in pay from $5.35 per hour to $8.00 per hour. Tr. 359-371.

Robinson further evaluated the jobs assuming Claimant was restricted by Dr. Tandron to no bending of the knee more than once or twice per hour. Tr. 374. He testified that the remaining jobs, including the Parkway cashier, Ex 184 at 71, Tr. 461, 466; Pilot Pen packer, Ex 184 at 73, Tr. 471-72; Comfort Inn desk clerk, Ex 184 at (unnumbered), 4 of 19; Republic Parking Cashier, Ex 184 at 77; Main Street garage Ex 184 at 78; C&H Lures, Ex 184 at 83; Central Parking lot attendant, Ex 184 at 85; and Parkspace cashier, Ex 184 at 87, involved bending, stooping, and squatting "as needed," but he was unable to clarify whether that meant more than once or twice an hour. Tr. 462-63. *See*, Tandron Depo (continued) at 61.

The Pilot Pen opportunity involved three different jobs, two of which required occasional squatting, and blister packing which involved "very infrequent" squatting. Tr. 471-73. Claimant applied for the job but was unsuccessful. Tr. 472-74. The Comfort Inn job involved the use of computers, telephones, and credit card machines. Tr. 477. Despite his slight speech impediment, Robinson did not believe that the job was unsuitable for Hawkins, Tr. 477, however, the employer only hired inexperienced desk clerks occasionally, and when Hawkins applied for this job and was rejected. Tr. 478. The job at Republic Parking at Jacksonville Airport required no bending, stooping or squatting, Tr. 509-510, but the employee works in a small booth and whether it provided sufficient room for a stool to sit on was not clarified. Tr. 482-83. At the Main Street Garage the booth was larger and the employee was able to sit or stand, Tr. 484, but the position was filled before Hawkins applied. Tr. 485, Tr. 510. Finally, Hawkins applied for the jobs at C&H Lures as an assembly worker, and as a lot attendant at Central Parking, but failed to secure either. Tr. 487, Tr. 488-89. Both were filled by the time he applied. The parking garage job, for example, was available on January 5, 2004, but was filled by March 9, 2004, when Hawkins applied for it. Tr. 493-94.

The job at Harmony Dental Lab Ex 184 at 86, involved "occasional" squatting and required the applicant to take two tests, one involving clerical accuracy and a second involving spatial abilities. According to Robinson, Hawkins demonstrated average or better aptitude in both areas. Tr. 489-91. Robinson testified that, at the time, the employer had no opening, Tr. 492, but was willing to test Hawkins. When Hawkins arrived to take the test, however, he indicated that he wanted no less than $10.00 per hour, and since the job paid $6.50 per hour the Employer did not proceed with the test. Tr. 491.

Robinson completed a third labor market survey dated October 15, 2004. Tr. 381. On this occasion, he identified sixteen jobs, Tr. 381, of which Dr. Tandron approved the following: assembly production worker involving inspection with microscope and good eye/hand coordination, deemed suitable by Robinson particularly in view of Hawkins college level training, Tr. 383, 495-7; lot attendant which Robinson rejected it due to driving requirements, Tr. 385, Tr. 500; Republic Parking cashier at $6.00 per hour, Tr. 386, 501; packer at Pilot Pen at $7.00-$7.70 per hour, Tr. 386, 501; I-Tech quality control at $7.50 per hour, Tr. 386; Desktop Digital packager at $7.00 per hour, Tr. 387; Harmony Dental Lab trainee at $6.50 per hour, Tr. 387, Tr. 503; sweeper driver approved by Dr. Tandron but rejected by Robinson as unsuitable, Tr. 387-88; AAA Alert alarm monitor at $8.00 per hour, Tr. 388, Tr. 503-504.

The job at I-Tech involved personnel quality control involving the use of a microscope. Hawkins applied for this position and was advised that it required experience. Cx 33; Tr. 501. The job at Desktop Digital involved packaging and was available on September 2, 2004 but was filled when Claimant applied on November 11, 2004. Tr. 502.

Robinson concluded that the jobs approved by both him and Dr. Tandron were reasonably available to Hawkins and suitable considering his physical restrictions and limitations. Tr. 392.

Robinson testified that when he uses the term "occasional," to describe a squatting requirement, for example, he means zero to 33% of the time or during an 8-hour day zero to 2.82 hours. Tr. 390-91. He uses "occasional" rather than "never" unless an employer says: "They just don't do it." Tr. 392.

In describing the jobs to Dr. Tandron, Robinson did not specifically advise him that "occasional" meant up to 33% of the time. Tr. 426. At his deposition, Dr. Tandron was advised that "occasional" meant "up to 33% of the day," Tandron

Depo at 57; *See*, Tr. 426-27, and Dr. Tandron explained that the squatting limitation he imposed was limited to once or twice an hour. Robinson acknowledged that his understanding of Dr. Tandron's bending and squatting restrictions increased as Dr. Tandron clarified what he intended, and, as a result, he was able to be more specific about the particular requirements of the jobs identified. Tr. 428. He called each of the employers in Hawkins' labor market surveys, Tr. 389-90; 430-31; 503, to determine the squatting requirements and asked if they would accept an application from someone with Claimant's vocational profile. He did not ask if they would actually hire Claimant. Tr. 434.

Robinson acknowledged that some of the jobs reflect a retroactive job survey, some were currently available. Tr. 505-06. The jobs he identified using a cash register, making change, and using a computer were based on Claimant's age, his level of education, and his work experience. Tr. 446. In his opinion, Hawkins conducted a diligent work search on his own, Tr. 514, but slacked off when he enrolled in school, Tr. 515, and that "realistically" Hawkins is a $7.00 per hour candidate not a $10.00 per hour candidate. Tr. 516.

## IV.
## Job Search

Claimant testified that he's ready to go back to work. Tr. 96. He returned to the docks twice, but was unable to complete his shift on either occasion. Tr. 118. EX 185; Tr. 104. He tried lashing but it was too heavy. He went back and tried auto driver, Tr. 96; 169, but had trouble getting in and out of cars wearing the brace, and his leg swelled. After about an hour, he left work and the foreman told him not to come back while wearing the leg brace. Tr. 97. The Local eventually told him there was no light longshore work. He now claims he is unable to work as a van driver because the steel cage behind the driver's seat prevents adjustment so the driver is unable to stretch his legs. Tr. 102; 149. In addition, he noted that a van driver may be required to perform tasks other than driving, and may be reassigned to lash down cars or help the gear man. Tr. 205.

The record shows that Claimant sought jobs at Winn Dixie, Albertson's, and Target but all required applications by computer, and Hawkins claimed he lacked the computer skills to apply. As a result, he took a computer course, Tr. 103, and received a grade of "B" in computer keyboarding. Tr. 109. He claims he is constantly looking for work. Tr. 110.

In November, 2004, Hawkins was offered a job, full time, driving a tow motor for an employer that operated a fruit stand near Yulee, Florida, Tr. 114-117,[2] but he doubted that the job was consistent with the limitations imposed by Dr. Tandron because he did not believe he would "be able to sit on it with my leg. " Tr. 111. He actually declined the job offer, however, because he had enrolled in a course and the work hours were incompatible with his course schedule. Tr. 110-111; 199-200. Claimant, at the time, wanted part-time work. Tr. 110. The English course he took met one hour Monday through Thursday, and, Claimant testified, it occupied "all his time." Tr. 128. When he enrolled in school, he ceased his active search for work, but he kept a look-out for any high paying jobs that required little work. Tr. 129-133.

Hawkins followed up on the labor market survey jobs identified by Robinson, Tr. 174;Tr. 206, but he was offered no job described as available by Employer. Tr. 114.

## Discussion

### Employer's Burden

Employer argues that Claimant sustained a scheduled injury of the knee, and insists that it has compensated him fully for the resulting injury under 33 U.S.C. §§ 908 (c) (2). Citing Pepco v. Director, 449 U.S. 268, 273,281-83 (1980), Employer expostulates that the exclusive recovery for any scheduled injury involving a permanent partial impairment is established by the number of weeks of compensation set forth in the schedule itself without reference to any actual loss of wage earning capacity a Claimant may have suffered as a consequence of the scheduled injury. Emp. Br. at 2.

As Employer seems to recognize, however, the schedule in Section (8)(c) of the Act is entitled "Permanent Partial Disability" and applies under Pepco to disabilities that are "partial" in character and "permanent" in quality. The schedule does not apply to injuries that result in permanent total disability. Pepco, *supra*. Consequently, in this proceeding, since Claimant has demonstrated that his injuries prevent him from returning to his job as a lasher, he must be deemed totally disabled unless the Employer otherwise establishes the availability of "suitable alternate employment." New Orleans Stevedores v. Turner 661 F.2d 1031 (5th Cir.

[2] Claimant's counsel later inquired whether Claimant had confused this fruit stand job offer with the Citgo cashier/stocker job which Dr. Tandron approved but Robinson later rejected as unsuitable. See, Tr. 115-117. Claimant, however, clearly distinguished the job offer driving the tow motor from the Citgo cashier position.

Nov. 1981). P&M Crane Company v. Hayes 930 F.2d 424 (5th Cir. 1991); Rogers Terminal and Shipping v. Director, 784 F.2d 687 (5th Cir. 1986); New Orleans Stevedores v. Turner, 661 F.2d 1031 (5th Cir. 1981); Lentz v. Cottman Company, 852 F.2d 129 (4th Cir. 1988; Diaosdado v. John Bloodworth Marine, 29 BRBS 125 (9th Cir. 1996); Hairston v. Todd Shipyards Corp., 21 BRBS 122 (CRT) (9th Cir. 1988); Palombo v. Director, 937 F.2d 70 (2d Cir. (1991).

If suitable alternate employment is demonstrated, Claimant must be permitted to show that he diligently tried and reasonably failed to obtain such employment. *See,* Palombo*, supra;* Williams v. Halter Marine Services, 19 BRBS 248 (1987). Should Claimant succeed in demonstrating the unavailability of suitable jobs, his disability is total, and the schedule is inapplicable. Palombo*, supra*. If, however, Claimant's search lacked reasonable diligence or if it was indeed successful and he secured a job, the disability is partial and the schedule applies regardless of any increase or decrease in his residual wage earning capacity. *See*, Rowe v. Newport News Shipbuilding and Drydock Co., 193 F.3d 836 (4th Cir. 1999); Southern v. Farmers Export Co., 17 BRBS 64(1985).

Since Claimant has shown that he cannot return to his former job, the burden shifts to the Employer to establish "suitable alternative employment." New Orleans Stevedores v. Turner, 661 F.2d 1031 (5th Cir., 1981). Claimant argues further that the term "suitable alternative employment" must be defined on a case by case basis, and in this instance, the Employer identified jobs that either were available but not suitable, or suitable but not available, either because Claimant was unable to secure the job or because Employer's vocational expert could not "guarantee" that stooping and squatting requirements were consistent with Dr. Tandron's restrictions.

Now, an employer's burden in establishing suitable alternative employment has not yet been addressed by the Eleventh Circuit. It has, however, been considered by the First, Second, Third, Fourth, Fifth, Seventh, and Ninth Circuits, and the D.C. Circuit, and the guidance provided is mixed. Air America, Inc. v. Director, 597 F.2d 773 (1st Cir. 1979); Argonaut Ins. Co. v. Director, 646 F.2d 710 (1st Cir. 1981); Palombo v. Director, 937 F.2d 70 (2nd Cir. 1991); McCabe v. Sun Shipbuilding & Dry Dock Co., 602 F.2d 59 (3rd Cir. 1979); Lentz v. Cottman Company, 852 F.2d 129 (4th Cir. 1988); Tann v. Newport News Shipbuilding and Drydock Co., 84 F. 2d 540 (4th Cir. 1984); Universal Maritime Corp. v. Moore, 126 F. 3d 256 (4th Cir. 1997);P&M Crane Company v. Hayes, 930 F.2d 424 (5th Cir. 1990); Rogers Terminal and Shipping v. Director, 784 F.2d 687 (5th Cir. 1986); New Orleans Stevedore's v. Turner, 661 F.2d 1031 (5th Cir. 1981);

Diosdado v. John Bloodworth Marine, 37 F.3d 629 (5th Cir. 1994); Bunge v. Carlisle, 227 F.3d 934 (7th Cir. 2000); Stevens v. Director, 909 F.2d 1256 (9th Cir. 1990); Hairston v. Todd Shipyards Corp., 849 F.2d 1194 (9th Cir. 1988).

In the First Circuit, for example, an employer need not prove the existence of actual available jobs when it is "obvious" that jobs are available for someone with the claimant's age, education, and experience. *See*, Air America, *supra*. In contrast, Diosdado indicates that one job is insufficient as a matter of law to satisfy the employer's burden. Similarly, in Lentz, the court held that the identification of a single job opening as an elevator operator does not satisfy the "suitable alternative employment" standard. The rationale in Lentz suggests it would be unreasonable to expect that an illiterate Claimant would be able to seek out and secure a specific job. Hairston further suggests that it is not sufficient to point to general work a Claimant may be physically able to perform. In the Ninth Circuit, the employer must identify specific suitable jobs. Under Hayes and Turner, Employer need only demonstrate that there were jobs reasonably available within Claimant's capabilities and as few as one or two available jobs within Claimant's specific capabilities. I note further that the Second Circuit in Palombo cited with approval, the limited burden Turner imposes upon the employer. At the opposite pole of appellate reasoning, the Fourth Circuit in Moore held that an employer may, in assessing job requirements, simply rely on the general job descriptions found in the Dictionary of Occupational Titles and need not contact employers to determine the actual requirements of an available job or whether the employer would hire someone with claimant's vocational profile. Guided by these diverse pronouncements, we turn to the jobs that Employer considered available and suitable for Claimant Hawkins.

Longshore Jobs

The parties stipulated that Claimant reached MMI, on August 24, 2003, and Employer asserts that, from that date forward, he was able to perform the duties of both an auto driver, so long as he wore his knee brace, and a van driver. Indeed, both the Employer's vocational expert and Dr. Tandron initially approved these jobs as suitable for Hawkins. Although Claimant had worked chiefly as a lasher before his injury, Employer notes that he did drive autos about 20% of the time and also served as van driver from time to time. Employer reasons that, given his "G" Card seniority, Claimant likely would have been able to secure either job on most days auto carrier work was available on the docks; and, in fact, he did return on two occasions to work as an auto driver and as a lasher, *see* Emp. Br. at 19-20, although the latter job represents a position Dr. Tandron did not approve.

Claimant responds that he did attempt to return to work on the docks, but he was unable to complete a full shift on either occasion due to pain and swelling in his knee. He notes that although Dr. Tandron initially approved van driving and auto driving as suitable, they were subsequently disapproved by Dr. Tandron based on Claimant's unsuccessful attempt to work as an auto driver, additional information about the duties they entail, and the letters from Local 1408 advising that no light duty or modified duty jobs are available on the docks.

Claimant argues further that van driving and auto driving both impose duties which, even if isolated to those jobs, he can not perform; but, in any event, the duties cannot be isolated because under the collective bargaining agreement van drivers and auto drivers may be required by the header to perform other jobs during a shift. Local 1408 President Vince Cameron thus testified that under the collective bargaining agreement the header can move a longshoreman from job to job regardless of the position the worker initially bid. President Cameron explained that the header usually respects seniority in moving workers around, and if seniority were by-passed to accommodate injuries, it would amount to preferential treatment that would reverberate through the gangs. As a result, if the worker is unable to perform the work assigned, a worker with higher seniority may be required to take his place, causing dissention among the rank and file. To prevent this, the Local asserts that it retains the right to block any of its members from shaping up for any job unless they are sufficiently able-bodied to perform every job on the docks.[3]

President Cameron noted further, however, that the stevedores at present can, under the collective bargaining agreement, decide after shape up that an

[3] [3] In a non-schedule case, measuring the post-injury wage earning capacity is a crucial undertaking in determining the level of compensation an injured worker receives as a consequence of a permanent partial disability. Thus, Section 8(c)(21) provides that an award for unscheduled permanent partial disability is based on the difference between the claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. As such, in many non-schedule cases of permanent partial disability, the employer seeks to establish not only the availability of suitable alternative employment, but the availability of suitable high wage jobs that pay as close as possible to the disabled worker's pre-injury average weekly wage, thereby reducing the loss of wage earning capacity and reducing the compensation rate as a consequence. Typically in such cases, a claimant's residual wage earning capacity is usually the highest and loss of wage earning capacity is usually the lowest, if suitable alternate longshore jobs are available. Consequently, the position taken by the Local 1408 in this matter, that there are no light duty or modified duty jobs available on the docks, and that only able-bodied workers who can perform all longshore jobs can shape-up, could have a significant impact on an injured worker's compensation rate in a non-schedule case. In contrast, the amount of loss of wage earning capacity is here irrelevant. So long as suitable alternative employment is reasonably available to Claimant, whether on the docks in a longshoring job paying at or near his average weekly wage or off the docks in an open market job paying minimum wage, *See*, Pepco, *supra*; Gilchrist v. Newport News Shipbuilding and Drydock Co, the schedule would apply.

injured worker who, for example, secured a van driver job would not be moved, but he is unaware of any instance in which a stevedore sought to prevent the reassignment of an injured worker. Apparently, neither the Local nor the stevedores are anxious to tackle the thorny seniority issues that may arise if an injured worker is unable to perform all of the jobs the header may assign during the course of a shift.

Thus, the parties expended considerable resources intensely advocating their respective, and opposing, assertions about the availability of light or modified duty work on the docks and the Local's right to block non-able bodied workers from shape up; the Employer characterized the Local's assertions as disingenuous lies, while the Local accused Employer of ignoring the collective bargaining agreement. Yet, these issues are tangents on this record and, despite the vigor of the advocacy, they need not be addressed in this proceeding. Whether or not the Local could or would actually prevent an injured worker from shaping up is irrelevant, because the record demonstrates that neither the van driver nor auto driver job, considered in isolation, is suitable for this Claimant.[4]

Notwithstanding the limited perspective provided by the video tape or similar episodic observations, the evidenced shows that auto drivers are often required to walk ramps from deck to deck and climb ladders and spiral staircases to access decks aboard auto carriers which the van is unable to reach, and Hawkins can not satisfy such requirements. Indeed, after reaching MMI he actually attempted to work as an auto driver, but when his knee flared up he was knocked off by the ship foreman and told not to return wearing a leg brace. Similarly, while the van driver usually just shuttles auto drivers and is free to get out and stretch his legs often if the seat adjustment is uncomfortable, the record further shows that the van driver also may be expected to hook-up cars for towing and carry water and equipment. Again, Hawkins can not perform these collateral, but required, tasks.

As a result, Dr. Tandron, who approved these jobs based upon the job descriptions he was initially provided, later, with a better understanding of the duties they actually entailed, concluded that neither job was consistent with the restrictions he imposed on Hawkins' physical activity. Considering the record viewed in its entirety, and particularly the fact that Dr. Tandron eventually

[4] Employer cites Davis v. Seaco, 1992 LHC 2585 (ALJ, 2001) in support of its arguments. Yet, Seaco is distinguishable on several grounds, although the only one that need be mentioned here is Seaco's holding that Davis could perform several of the longshore jobs that Employer Seaco identified. That is not the situation here. The Employer also embraced Taylor v. Ceres Marine Terminals, 2000 LHC 946 (ALJ, Sep. 13, 2000) but cited to a one page Order approving settlement which hardly supports the proposition it advances in this proceeding.

disapproved both jobs, it must be concluded that neither job, considered in isolation apart from any other longshore work, is suitable for this Claimant.

Suitable Alternate Employment
Non-Longshore

The Employer's vocational expert also surveyed the relevant labor market for suitable non-longshore job opportunities. His first labor market survey, dated September 19, 2003, identified nine jobs Robinson initially considered vocationally appropriate for Hawkins. Dr. Tandron later approved four of nine jobs: route service representative; checker; truck driver; and alarm monitor. Although the Employer contends that Claimant agreed he could work as an alarm monitor, route representative, and checker, *See*, Emp. Br. at 15-16, and Claimant testified that he does believe he is capable of working, Tr. 121-22, the record shows that none of these jobs are suitable for him. Specifically, after reviewing the modifications Dr. Tandron imposed on two of the jobs, route representative and checker, Robinson deemed both jobs inappropriate. Further, upon careful consideration of Claimant's physical restrictions as Dr. Tandron explained them over time, Robinson also concluded that the truck driver/hustler job was unsuitable in view of the thirty inch step used to get into the vehicle.

As a consequence, the only remaining job from the first labor market survey approved by both Dr. Tandron and Rick Robinson was the AAA Alert alarm monitor job. It entailed 100% sitting, with bending, stooping and squatting "as needed;" however, Hawkins has a criminal record with three criminal felony convictions, and although the convictions were over ten years ago, Robinson did not inquire whether the alarm company performed a background check on prospective employees. At the hearing, however, he acknowledged it would be reasonable for a security alarm company to decline to hire someone with a criminal background, and indeed, the record shows Hawkins applied for this job, and was told nothing was available.

Under these circumstances, the Board's decision in Piunti v. ITO Corp., 23 BRBS 367 (1990) seems applicable. In Piunti, a claimant's pre-injury criminal record was deemed relevant in determining if a post-injury job was realistically available; and it seems equally relevant here. In light of Claimant's three pre-injury convictions, and considering the nature of the security alarm business and Robinson's acknowledgement that it would be reasonable for an alarm company to reject job applicants with felony convictions, I conclude in accordance with Piunti, that the Employer has not sustained its burden of demonstrating the availability of

this particular job or security alarm monitor jobs in general to an individual with Hawkins' vocational profile.

Robinson conducted two more labor market surveys, but only the second survey, which included jobs available from January 1, 2004, through April 30, 2004, need be further considered. In the second survey, Robinson identified nineteen jobs he initially considered vocationally appropriate for Hawkins, and Dr. Tandron approved sixteen of them. Five of the jobs were subsequently deemed inappropriate by Robinson because Dr. Tandron included modifications which were incompatible with the exertional requirements of the job. These included Order/packer, Flash Foods cashier, Citgo cashier/stocker, restaurant dishwasher, and driver/dental lab technician. Additionally, Robinson eliminated a job as a dental lab driver because Hawkins had eleven points on his driving record.

Robinson revisited the suitability of the remaining jobs assuming Claimant was further restricted by Dr. Tandron to no bending of the knee more than once or twice per hour. He testified that the remaining jobs, including the Parkway cashier, Pilot Pen packer, Comfort Inn desk clerk, Republic Parking cashier, Main Street garage cashier, C&H Lures, Central Parking lot attendant, and Parkspace cashier, involved bending, stooping, and squatting "as needed," but he was unable to determine whether that meant more than once or twice an hour as specified by Dr. Tandron.

The Pilot Pen opportunity involved three different jobs, two of which required occasional squatting, but blister packing involved "very infrequent" squatting. Claimant applied for the job but was unsuccessful. The Comfort Inn job involved the use of computers, telephones, and credit card machines. Despite Claimant's slight speech impediment, Robinson did not believe that the job was unsuitable for Hawkins, however, the employer only hired inexperienced desk clerks occasionally, and when Hawkins applied for this job and was rejected. The job at Republic Parking at Jacksonville Airport required no bending, stooping or squatting, but the employee works in a small both and the availability of a stool to sit on was not clarified. At the Main Street Garage the employee was able to sit or stand, and the position was quickly filled. Finally, Hawkins applied for the jobs at C&H Lures as an assembly worker, and as a lot attendant at Central Parking, but failed to secure either. The parking garage job was available on January 5, 2004, but was filled by March 9, 2004, when Hawkins applied for it.

The job at Harmony Dental Lab involved "occasional" squatting and required the applicant to take two tests, one involving clerical accuracy, and a

second test involving spatial abilities. According to Robinson, Hawkins demonstrated average or better aptitude in both areas. Robinson testified that, at the time, the employer had no opening, but was willing to test Hawkins; however, when Hawkins arrived to take the test, he indicated that he wanted no less than $10.00 per hour. Since the job paid $6.50 per hour, the Employer did not proceed with the test.

Although approved by Dr. Tandron and Rick Robinson, it appears, based on the record before me that several of these jobs remained either unavailable or unsuitable for Claimant. The Comfort Inn position, for example, generally required experience, and the particular opening listed in the labor market survey required experience, although the Employer may sporadically hire an inexperienced desk clerks. Under these circumstances, I conclude that a fortuitous, unusual job opening for an inexperienced applicant is not sufficient to demonstrate reasonable availability of the job to an injured worker with Claimant's vocational profile.

Similarly, the job of parking lot attendant at Republic Parking does not appear suitable on this record. Dr. Tandron restricted Claimant to standing no more than 50% of an 8-hour workday, and Robinson acknowledged that the lot attendant's booth at the airport was very small and possibly too small to permit Claimant to place a stool which would allow him to sit down. As such, it would be difficult to conclude that Employer has demonstrated that this position is consistent with Dr. Tandron's restrictions.[5]

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[5] It should be noted that under the Fourth Circuit's decision in Universal Marine v. Moore, *supra*, evidence of the actual suitability of a particular job would not be required since the employer would be free to rely on the DOT job description. Yet, the generalities of the job descriptions in the DOT were never designed to assess the suitability of a job for injured workers consistent with their restrictions and the humanitarian purposes of the Longshore Act. In fact, the DOT contains a "SPECIAL NOTICE" which strongly suggests that it should not be used as the final source in determining suitable alternative employment in disability cases. The DOT Notice states: "Occupational information contained in the revised forth edition DOT reflects jobs as they have been found to occur, but they may not coincide in every respect with the content of jobs as performed in particular establishments or at certain localities. DOT users demanding specific job requirements should supplement this data with local information detailing jobs within their community."

Furthermore, as the evidence in this record amply demonstrates, actual job requirements and circumstances may vary widely within any given DOT category. In this instance, for example, considering the broad, general job descriptions initially provided to him, Dr. Tandron approved many jobs that he later disapproved when he learned about aspects of the job not included in the general descriptions. Indeed, the record does not show that any DOT-type general job description actually describes all of the duties and physical demands required by any job in the labor market survey or indeed by any job in that general category of jobs actually available in the labor market itself. As the DOT emphasizes in a "PREFATORY NOTE: … The DOT offers a starting place from which to address issues of training and education, career guidance and employment counseling, job definition and wage restructuring." Thus, the DOT may be a useful starting point for a vocational expert; but adopting it, as the

Several jobs on this second survey do, however, qualify as available and suitable. These include the parking garage attendants except the job at Republic, the Pilot Pen blister packer; and the job at C&H Lures. I am mindful that Claimant challenged each of these positions on several grounds including the ground that Dr. Tandron restricted him to squatting no more than once or twice an hour. Thus Claimant objected to the Parkway job as requiring too much squatting, and demanding skills in using a computer cash registers, phones, and credit card machines he did not possess. *See*, Cl. Br. at 8-9. He also challenged the job at the Main and Monroe Street Garage, because the employee sat in booth and Robinson could not say whether Claimant's brace could be accommodated, and further the job was filled when Claimant applied. *See*, Cl. Br at 11.

Claimant argues further that amount of squatting required by the job at C&H Lures was not clarified with company owner, and job was not available when Claimant applied. *See,* Cl. Br. at 12. He also rejects the job at Central Parking as unsuitable because the squatting and stooping "never determined," it involved 50% standing and since "Hawkins must walk to stand," Claimant argues that the job exceeded his combined 50% walking and standing restriction. Yet, Dr. Tandron obviously understood that claimant must "walk to stand," but he was apparently unconcerned about the incidental walking associated with this job because he approved it. Claimant argues further, however, that the job was not available when Claimant applied. *See*, Cl. Br. at 12-13.

At Pilot Pen, Claimant contends that the squatting requirements were not clarified, and the job was not availability on April 14, 2004. *See*, Cl Br. at 15. He further protests that the job at Harmony Dental Labs was filled before Dr. Tandron was asked to review it, that the squatting requirement not clarified, and that the employer administers two tests to applicants, and Robinson failed "formally" to test Claimant's aptitudes to ascertain his likelihood of passing the tests. *See*, Cl. Br. at 13-14. Finally, Claimant dismisses that job at Parkspace, alleging that the squatting requirement was not clarified and the job was filled as of March 9, 2004, when Claimant applied. *See*, Cl. Br. at 14.

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Employer here urges, as a determining factor in describing suitable alternative employment would not seem consistent with the caveats embodied in the DOT itself, and the Eleventh Circuit has not ruled otherwise.

Guaranteeing Suitability

Claimant's protestations to the contrary notwithstanding, the record shows Robinson did all he could to ascertain the precise squatting requirements of these jobs. He explained that he used the term "as needed" when a job demanded very little squatting, but he would rarely say a job "never" required squatting. These jobs actually entailed squatting or stooping only rarely, for example, when an item is dropped and must be retrieved. Robinson conceded on cross-examination that he could not "guarantee" that any of these jobs would never require Claimant to squat or stoop more than once or twice an hour. Yet, the standard Claimant would impose on the vocational inquiry is unsupported by citation to precedent or guidance in any Court decision or Board authority, and I am unaware of any.

It is not the Employer's burden to "guarantee" through the evaluation of a vocational expert that any job would "never" place an injured worker in a position which is inconsistent with his physician's restrictions. In this instance, Robinson diligently inquired about and re-evaluated each of the jobs he identified even as Dr. Tandron refined his restrictions over time. The record clearly demonstrates that Robinson fairly probed as thoroughly as he could with employers he contacted the actual squatting requirements of the jobs they offered.

As might be expected, few employers would describe any job as "never" requiring squatting or stooping, even if squatting and stooping were not normally physical movements required to complete the tasks associated with performing the job. For example, the garage attendant might never need to stoop or squat unless he drops a ticket or the customer's change. While a vocational expert cannot guarantee that might not occur more than twice an hour, it is not the employer's burden to guarantee against mischance. The employer's burden is not satisfied if its vocational expert is uncertain whether jobs are suitable, *see* Uglesich v. Stevedoring Serv. of America, 24 BRBS 180(1990), but no case requires that a vocational expert "guarantee" suitability. A job which is otherwise suitable may not be rejected on the premise that isolated mishaps could arise that may place the worker in a position involving movement which is inconsistent with his physical restrictions. Suitable alternative employment could never be established if that were the test.

As previously discussed, the Circuit Courts have differing views on what constitutes a sufficient showing of suitable alternate employment, but the evidence before me is sufficient to conclude that the Employer here has satisfied the burden

imposed by every Circuit Court that has reviewed the issue. Palombo, *supra*, and Turner and consistent with Lentz, *supra,* and Diosdado, *supra,* The evidence indeed satisfies the Employer's burden whether it is required to demonstrate general categories of jobs Claimant can perform and one or two which are available, or several specific available jobs Claimant can perform. (*See*, Hayes, *supra*; Turner, *supra;* Lentz, *supra;* Moore, supra; Tann, *supra*; and Palombo, *supra*; Diosdado, *supra* and Hairston, *supra*). I conclude that suitable alternate employement is available to this Claimant.

Diligence of Claimant's Job Search

Claimant argues in his post-hearing brief that even if it were concluded that one or more jobs identified by the Employer turned out to be suitable, he has demonstrated through his diligent job search efforts that such employment was not available to him. As noted above, under applicable case law, a disabled worker who diligently tries and is unable to secure such employment, may be deemed totally disabled. Palombo, *supra*; Turner, *supra*.

The question thus focuses upon the Claimant's effort and motivation. The Second Circuit observed in Palombo: "[w]e believe that a Claimant's lack of success after diligent searching for a suitable job may be equally or even more probative of actual job availability than a vocational expert's job survey. *See*, New Orleans (Gulfwide) Stevedores v. Turner 661 F.2d 1031, 1043, 14 BRBS 156, 165 (5th Cir. 1981), rev'g 5 BRBS 418 (1977); Trans-State Dredging v. Benefits Review Bd. (Taney), 731 F.2d 199, 201-22, 16 BRBS 74, 76 (CRT) (4th Cir. 1984), 13 BRBS 53 (1980); Royce v. Elrich Constr. Co., 17 BRBS 157, 159 n.2 (1985). Providing further guidance, the Palombo court noted that Claimant must prove that his search was a "reasonably diligent" effort to secure jobs similar to the sedentary or light duty jobs the Employer showed were reasonably available.

Initially, Employer questions Claimant's diligence because he actually received an offer for a full time job which he declined because it conflicted with his educational endeavors. This instance, however, is not especially probative. Under the Board's decision in Shiver v. U.S. Marine Corps Base Exch., 23 BRBS 246 (1990), a single suitable job offer may be sufficient to establish the availability of alternative employment, and sufficient to render the character of Claimant's disability partial in nature.

Nevertheless, the full-time job offer at a fruit stand in Yulee, Florida, does not establish the applicability of the schedule under Shiver on this record, because

the Employer never attempted to establish the suitability of this job. No tow motor driver job was included in any of the three labor market surveys conducted by Robinson, and the two jobs in Yulee mentioned in the labor market surveys entailed cashier positions which either Dr. Tandron or Mr. Robinson rejected as unsuitable. Indeed, it does not appear that Dr. Tandron or Rick Robinson ever evaluated the suitability of the tow motor operator job.

The record shows that Hawkins' job search efforts waxed and waned over time. Initially, he actively pursued his own search and even impressed Robinson with the diligence of his effort. Later, he decided to enroll in a course and essentially abandoned his search effort although he remained on the lookout for any job offering "high wages and less time…." Thereafter, upon receiving copies of the Employer's labor market surveys, Hawkins contacted each employer and was hired by none; but several of the jobs were filled before he applied.

Thus, the record shows that Robinson's surveys included both currently available and historically available jobs identified retroactively. Consequently, several jobs that were available when surveyed were filled by the time Hawkins applied. Yet, the results remain relevant. While several jobs may have been filled when surveyed, it is clear that the availability of suitable alternate employment can be established retroactively. Tann, *supra*; Jones v. Genco, Inc., 21 BRBS 12 (1988).

There is, moreover, an additional reason to question the diligence with which Hawkins pursued many of the jobs found suitable by Robinson and Dr. Tandron. The record shows that Claimant had wage expectations that were incompatible with the salary levels of many of jobs which were suitable for him. He candidly acknowledged that the type of employment he really wanted included jobs: "making a good salary, making good money and it ain't got to work a whole lot of hours I'm always open for that type of job if it's available." He appeared willing to settle for about $10.00 per hour; however, the available and suitable jobs paid on average about $7.00 per hour, and there are indications in this record that Claimant's effort to secure employment which paid less than his wage expectations may have been less than diligent. Dionisopoulis v. Pete Papas & Sons, 16 BRBS 93 (1983).

At Harmony Dental Labs, for example, Claimant's job pursuit may appropriately be described as less than diligent, because Claimant's minimum pay demand of $10.00 per hour exceeded the pay rate offered by the employer, and at that point, Claimant's effort to qualify for the job terminated. Although he did not

take the tests, Claimant argues that he lacked the skills this employer demanded and the vocational expert prepared no report assessing his transferable skills. Yet, Robinson testified that he did analyze Hawkins' transferable skills and aptitudes and determined that he was a good candidate for this position, and likely would have done well on the tests had he taken them. Under these circumstances, I must be guided by the Board's holding that a vocational expert's opinion is credible even if the expert did not examine the Claimant as long as the expert was, as Robinson demonstrated, aware of claimant's age, education, industrial history, and physical limitations when exploring the local opportunities. Southern v. Farmers Export Co., 17 BRBS 64 (1985); *see also*, Devillier v. National Steel & Shipbuilding Co., 10 BRBS 649, 660 (1979).

I am again mindful that the Second Circuit in Palombo considered a diligent search more probative of availability than a vocational expert's job survey; however, in contrast with the claimant in Palombo, Hawkins acknowledges that he essentially left the job market to take a course he believed would increase his competitiveness in the labor market and improve his chances of landing better paying jobs. While this is commendable, the issue under the schedule is whether Claimant diligently sought suitable alternate employment not whether he diligently sought to improve his potential to increase his wage earning capacity. Thus, the record shows that jobs which qualified as suitable and available in the relevant labor market were filled by the time Claimant contacted the employer's in response to the appearance of these jobs in the labor market survey. Nevertheless, since suitable alternative employment may be established retroactively, the fact that a suitable job is filled by the time Claimant applies does not render it unavailable for purposes of considering whether the labor market provides the Claimant with opportunities to secure suitable alternate work.

Considering Hawhins' age, education, work experience, physical condition, his general capacity to work with restrictions, the availability of jobs suitable for him, and the fact that he failed to exercise reasonable diligence in seeking non-maritime work, I conclude that the Employer has satisfied its threshold burden of establishing the availability of suitable alternate work consistent not only with Hayes, Turner, and Palombo, but the more restrictive test imposed by Lentz and Hairston. Finally, I conclude that Claimant's non-maritime search for work was neither consistent over time nor reasonably diligent in nature over time within the meaning of Palombo.

Period of Total Disability

Nevertheless, for the period from August 24, 2003, the date of MMI, to the earliest date employer establishes the availability of suitable alternate work, Claimant must be deemed totally disabled. Palombo, *supra*; Berkstressor, *supra*; Rinaldi v. General Dynamics Corp., 25 BRBS 128 (1991). Employer may, as noted above however, establish retroactively that suitable alternative employment existed on the date of maximum medical improvement. Tann, *supra*; Genco, Inc., *supra*. In this instance, Employer established the availability of suitable alternate employment, but not back to the date of MMI.

The record shows that Employer failed to satisfy its burden until the second labor market survey identified the job of cashier at Parkspace which was available on January 5, 2004. Neither that job, however, nor any other suitable job was established as retroactively available on the date of MMI within the meaning of Rinaldi, and accordingly, Claimant is entitled to compensation for total disability from August 24, 2003 to January 5, 2004; the earliest date suitable alternate employment is identified in this record. Thereafter, Claimant's disability is permanent in quality and partial in character and the schedule set forth in Section 8(c)(2) applies.

ORDER

IT IS ORDERED that the Employer pay to Claimant compensation for total disability based upon an average weekly wage of $1,665.97 for the period commencing August 24, 2003, through January 5, 2004, with credit for any total disability compensation already paid; and, thereafter, Employer shall pay Claimant compensation for his six percent right knee impairment in accordance with Section 8(c)(2) of the schedule; provided further that Employer shall receive credit for permanent partial disability compensation already paid.

A

Stuart A. Levin
Administrative Law Judge